

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2052

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA EX REL.
RICHARD LABELLE,

Appellant,

-against-

THE HONORABLE ROBERT J. HENDERSON,
Superintendent of the Auburn
Correctional Facility,

Appellee.

No. 77-2052

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P/S

APPELLANT'S BRIEF AND APPENDIX

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UNITED STATES COURT OF APPEALS
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RICHARD LaBELLE,

Appellant,

-against-

THE HONORABLE ROBERT J. HENDERSON,
Superintendent of the Auburn
Correctional Facility,

Appellee.

No. 77-2052

APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF ISSUES

- I. Whether the District Court was correct in dismissing Appellant's habeas corpus petition on the authority of Stone v. Powell because petitioner had a full and fair opportunity to litigate his Fourth Amendment claim.
- II. Whether the District Court should have granted the habeas corpus petition or held an evidentiary hearing on whether there was probable cause for petitioner's arrest without a warrant.

STATEMENT OF CASE

Preliminary Statement Pursuant to Rule 28(a)(3)

Richard LaBelle is an inmate serving a life sentence at the Auburn Correctional Facility based upon his 1969 conviction for first degree murder which was affirmed by the Appellate Division (People v. LaBelle, 37 App. Div. 2d 653, 322 N.Y.S.2d 960 (3d Dept. 1971 lev. to app. den. ____ N.Y.2d ____ (unreported, July 28, 1971))). This conviction followed his retrial on remand from the New York State Court of Appeals which reversed his original 1964 conviction (People v. LaBelle, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966) rev'g 24 App. Div. 2d 350, 266 N.Y.S.2d 165 (3d Dept. 1966))).

On April 27, 1976, petitioner filed this application for a writ of habeas corpus on the basis that his statements admitted at his trials were the direct result of his illegal arrest and should have been suppressed (Wong Sun v. U.S., 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975))). The Honorable Edmund Port, District Judge, reviewed the application, petitioner's memorandum, the state court transcripts, and the state court appellate briefs. On March 17, 1977, the District Court dismissed the petition on the authority of Stone v. Powell, ____ U.S. ____, 49 L. Ed. 2d 1012 (1976) without reaching the merits of petitioner's Fourth Amendment claim. The Court found petitioner " . . . has had not only

the 'opportunity' for, but the actuality of a full and fair litigation of his Fourth Amendment claim" (Dkt. No. 76-CV-182 N.D.N.Y.)

A notice of appeal was filed by petitioner on April 11, 1977, and petitioner's application for a certificate of probable cause was granted by Judge Port on April 11, 1977. Counsel was appointed for petitioner by order of the Honorable Wilfred Feinberg, Circuit Judge, on May 5, 1977.

Statement of Facts

On December 3, 1963, at 10:00 a.m. petitioner was arrested on a "John Doe" warrant alleging third degree assault on Mary Donlan (Record of Appeal from Second Trial (hereinafter second trial) 271). The warrant was issued by Joseph Daly, the Police Justice of the City of Troy (second trial 371). It was obtained in the following manner:

On December 2, 1963, Lt. Brandon of the State Police contacted Leo Barry, a Rensselaer County Detective and asked him to obtain an arrest warrant on a misdemeanor charge of third degree assault on Mary Donlan (second trial 313). Earlier that day, Miss Donlan, at the local State Police Headquarters had signed an affidavit alleging that the passenger of a car had tried to grab her on November 28 and she had memorized the license plate number (second trial 430; see, Affidavit of Mary Donlan, Exhibit 6, Exhibit Volume on Record of Appeal from First Trial (hereinafter first trial exhibits) 59). This affidavit was not presented to Judge Daly (second trial 501); the warrant was issued solely on information and belief of Leo Barry that the assault had occurred (second trial 507, see, Information of Leo Barry, Exhibit 8, first trial exhibits 62).

At the second trial on the issue of voluntariness, the judge charged the jury that petitioner was "arrested on a warrant without compliance under law and the detention under the arrest was illegal" (second trial 757).

Except for the Donlan affidavit, the record does not show what the police knew about petitioner prior to his arrest or why he was arrested. Donlan's affidavit identified the passenger in the car, apparently petitioner, as blond-headed and gave the license plate number of the car (first trial exhibits, exhibit 6, 59). Leo Barry testified petitioner's hair was dark on December 3, 1963 (Record on Appeal from First Trial (hereinafter first trial) 432-433). The license plate number identified petitioner's brother and co-defendant, Edward LaBelle (second trial 230-233). There was testimony at trial indicating that petitioner and Edward were together on the day of the alleged assault (second trial 184, 202, 216, 222, 237); however, there is no evidence to indicate when the police obtained this information. Attempts by petitioner to elicit testimony on the police's investigation prior to his arrest were foreclosed (first trial 218, 233-234, 417).

Following his arrest, petitioner was taken to police headquarters where a thirteen hour period of incommunicado custodial interrogation began. During this period, petitioner

was questioned solely about the murder of Rosemary Snay and never about the alleged assault of Mary Donlan. At approximately 11:00 p.m. petitioner made an oral statement which was then transcribed and signed at approximately 2:30 a.m. (second trial 302, 451). Petitioner was never arraigned on the third degree assault charge. The petitioner's statements were admitted at his trial in 1964 and his retrial in 1969.

State Court Proceedings

First Trial, 1964

A pre-trial hearing was held prior to petitioner's first trial (first trial 185-552); however, the hearing was strictly on the question of the voluntariness of his statements (first trial 198-199, 218, 233-234, 417; People v. LaBelle, 44 Misc. 2d 327, 330, 253 N.Y.S.2d 901, 903 (Rensselaer Co., County Ct., 1964)).

During the course of the first trial, a voir dire was conducted on the question of voluntariness (first trial 1168) before the admission of petitioner's statements (first trial 1168-1194). However, petitioner also indicated that it was his position that the statements were tainted by the illegal arrest (first trial 1172) and objected to their admission on these grounds (first trial 1194). The Court never ruled on the objection (first trial 1195) but the statement was admitted in a redacted form (first trial 1196).

Petitioner also raised his Fourth Amendment claim on a motion to dismiss the indictment at the close of the People's case (first trial 1590, 1592). The motion was denied (first trial 1598) and again denied when renewed at the end of the trial (first trial 1696). Petitioner was then convicted following a jury verdict.

Appeals from First Trial

Petitioner appealed from the first conviction to the Appellate Division which affirmed (People v. LaBelle, 24 App. Div. 2d 350, 226 N.Y.S.2d 165 (3d Dept. 1966) and to the Court of Appeals which reversed his conviction (People v. LaBelle, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966)).

Before the Appellate Division, petitioner did not explicitly raise his Fourth Amendment claim (see Appellant's First Appellate Division Brief (hereinafter first A.D. Brief) Pt. II B-2, 28; Pt. VII-3, 69); however, the point was explicitly raised before the N.Y. Court of Appeals (Appellant's Court of Appeals Brief, Pt. VII B-3, 63). The Court of Appeals did not rule on the point since it reversed on other grounds.

Second Trial, 1969

Prior to petitioner's second trial, he moved for a new pre-trial hearing on the voluntariness and/or admissability of his statements (second trial 73); the motion was denied (second trial 90).

During the second trial a voir dire on the issue of voluntariness was again conducted (second trial 453-461) and petitioner only objected to the statements on voluntariness grounds (second trial 461). However, the Fourth Amendment claim was explicitly raised during argument for a directed verdict of acquittal (second trial 499). The motion was summarily rejected (second trial 500). At the close of the second trial, the judge charged the jury that petitioner's arrest warrant was defective (second trial 757). Petitioner was then convicted following a jury verdict.

Appeal from Second Trial

Petitioner's conviction was upheld following appeal to the Appellate Division (People v. LaBelle, 37 App. Div. 2d 658, 322 N.Y.S.2d 960 (3d Dept. 1971)). He explicitly raised the Fourth Amendment claim on appeal (Second App. Div. Brief Pt. VII, 24) and the Appellate Division summarily rejected it as having been previously raised and rejected on the earlier appeals and without merit. (37 App. Div. 2d at 660; 322 N.Y.S. 2d at 964). Leave to appeal to the N.Y. Court of Appeals was denied on July 28, 1971, by the Honorable Francis Bergan, Associate Judge of the New York Court of Appeals.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE HABEAS CORPUS PETITION ON THE AUTHORITY OF STONE v. POWELL SINCE PETITIONER WAS NOT PROVIDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIM.

A. Introduction. The Opportunity Required.

Petitioner agrees with the District Court that Stone v. Powell, ____ U.S. ____ 49 L. Ed. 2d 1012 (1976) requires dismissal of this petition if petitioner had "an opportunity for a full and fair litigation of a Fourth Amendment claim" (Stone, 49 L. Ed. 2d 1012, 1088) "at trial and on direct review" (49 L. Ed. 2d at 1088 n. 37). However, petitioner did not have such an opportunity.

The Supreme Court "in Stone did not elaborate on the substance of the 'opportunity' required." (Gates v. Henderson, ____ F.2d ____ (2d Cir. Jan. 12, 1977) (Slip Op. 1345, 1352) a rehearing en banc granted Mar. 7, 1977). In Gates supra. and O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977), the courts attempted to elaborate on the opportunity required.

In Gates, this Court (pending further elaboration en banc) has concluded that the six situations requiring an evidentiary hearing on a habeas petition announced in Townsend v. Sain, 372 U.S. 293 (1963) should also be applied in determining the

opportunity required by Stone (Gates Slip Op. supra. at 1352-1353).

In O'Berry, the Court agreed that Townsend was of some help in defining the opportunity required but felt it could not use Townsend totally in arriving at the appropriate test (O'Berry, 546 F.2d supra. at 1211). The Court analyzed Stone and Townsend and arrived at the following standards:

1. Townsend should be employed to determine "whether a full and fair consideration of a fact issue has been afforded by the state courts" (O'Berry, 546 F.2d supra. at 1211).
2. "Where facts are in dispute full and fair consideration required consideration by the fact-finding court and at least the availability of meaningful review by a higher state court. (Id. at 1213)
3. "Where . . . facts are undisputed and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate court . . . gives full consideration to defendant's Fourth Amendment claims." (Id. at 1213)

Under neither the Gates nor O'Berry standards was petitioner granted the opportunity required by Stone.

B. Pre-Trial Hearing, 1964

Both Gates and O'Berry indicate that Townsend should be applied to determine whether a full and fair consideration of a fact issue has been afforded. In Townsend (372 U.S. at 314) the Supreme Court stated:

"There cannot even be a semblance of a full and fair hearing unless the state court actually reached and decided the issue of fact tendered by the defendant."

In petitioner's case, the judge specifically stated voluntariness was the only issue considered and decided at the pre-trial hearing:

"No finding is made whether . . . defendant was unlawfully detained. This proceeding is only concerned with the voluntariness of the statements . . . (first trial 556, People v. LaBelle, 44 Misc. 2d 327, 330; 253 N.Y.S.2d 901, 903).

Obviously, the pre-trial hearing did not meet the opportunity standard since the Court explicitly indicated it was not even ruling on whether petitioner was illegally arrested.

Moreover, the pre-trial "fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." (Townsend, 372 U.S. supra. at 313). Although petitioner was allowed to develop testimony concerning the issuance of his arrest warrant (first trial 428-441), he was not allowed to elicit testimony regarding the police investigation prior to his arrest due to the narrow scope of the hearing (first trial 198-199, 218, 233-234, 417). This testimony would have been highly probative of the issue of probable cause for a warrantless arrest, i.e. what the police knew and when they know it (Cf. Morales v. New York, 396 U.S. 102 (1969)).

As the Supreme Court pointed out in Townsend, 372 U.S. supra. at 316:

"Even where the procedure employed does not violate the Constitution, if it appears inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state finding and take evidence anew."

C. First Trial, 1964

It is questionable whether the first trial and its appeals should be considered in determining whether the "opportunity" requirement was met due to the subsequent reversal of the New York Court of Appeals (see, N.Y. Code of Criminal Procedure §§464, 544); however, the issue need not be dealt with since the requirement was not met in either case.

In Townsend, supra., while analyzing the first of its standards (Townsend, 372 U.S. supra. at 313) requiring a new evidentiary hearing, the Supreme Court stated:

"Reconstruction (of whether a court implicitly found the relevant facts) is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to petitioner's contention. Since the decision of the state trier of facts may rest upon an error of law rather than an adverse determination of fact a hearing is compelled to ascertain the facts." (Townsend, 372 U.S. supra. at 314).

The factual dispute surrounding petitioner's Fourth Amendment claim was not resolved by the Court in petitioner's first trial. The claim was raised on three occasions and in each case the record does not show the reason for the state court's rejection. On petitioner's objection to the admission of the statements following voir dire (first trial 1172, 1194) the court did not rule on the objection (first trial 1195). On the motions for dismissal of the indictment at the close of the People's case (first trial 1590, 1592) and at the end of trial (first trial 1696) the court summarily denied the motions containing multiple arguments (first trial 1598, 1696).

In each of these instances, the court did not make any underlying factual determinations relevant to petitioner's Fourth Amendment claim, if it actually considered the claim at all.

Since the same judge presided at the pre-trial hearing and trial, it can reasonably be assumed that a finding of fact regarding the issues illegal arrest and probable cause was considered unimportant (see, Point A above and Townsend, 372 U.S. supra. at 314 where the court suggests that rulings at a prior state hearing warrants the assumption that the court took a similar position at trial). This may have been because the court was applying incorrect constitutional standards. Such a result would not be surprising if the confusion before Brown v. Illinois, 422 U.S. 590 (1975) con-

cerning the applicability Wong Sun v. U.S., 371 U.S. 471 (1963) to statements following an illegal arrest is considered. (Hollingworth v. U.S., 321 F.2d 342, 350 (10th Cir. 1963); U.S. v. Davis, 456 F.2d 119 (10th Cir. 1972); U.S. v. Close, 349 F.2d 841 (4th Cir. 1965); Burke v. U.S., 328 F.2d 399 (1st Cir. 1964); People v. Briggs, 36 App. Div. 2d 790, 319 N.Y.S.2d 374 (3d Dept. 1971) contra.; Gutlin v. U.S., 326 F.2d 666 (D.C. Cir. 1963); U.S. v. Frazier, 385 F.2d 901 (6th Cir. 1967); Tubsy v. U.S., 451 F.2d 394 (8th Cir. 1971); U.S. v. Burhanon, 388 F.2d 961 (7th Cir. 1968); Pulido v. U.S., 425 F.2d 1391 (9th Cir. 1970); Collins v. Beto, 348 F.2d 823 (5th Cir. 1963); Gockley v. Meyers, 450 F.2d 232 (3rd Cir. 1971).

On this record Townsend would mandate a new evidentiary hearing. These circumstances, also, compel the conclusion that the Stone opportunity requirement was not met under either O'Berry or Gates.

Simply put, the Court never decided the arrest warrant was sufficient and never allowed testimony to develop on the issue of probable cause for a warrantless arrest (Cf. Morales v. New York, 396 U.S. 102 (1969)). As Gates stated "The evidence crucial to appellant's claim was that relating to the circumstances surrounding his arrest and it is clear that this evidence was not developed at all." (Slip Op. at 1355).

D. Appeals from First Trial

O'Berry, 546 F.2d supra. at 1213 takes the position that "where the facts are undisputed and there is nothing to be served by ordering a new evidentiary hearing the full and fair consideration requirement is satisfied where the appellate court presented with an undisputed factual record gives full consideration to defendant's Fourth Amendment claim" (emphasis added).

In this case a new evidentiary hearing is not only desirable but mandated under Townsend, supra. (see Points B and C supra.) Consequently, the O'Berry standard is not satisfied.

An examination of the appeals court decisions and appellate briefs also shows full consideration was not given to the Fourth Amendment claim. Before the Appellate Division, petitioner argued his statements should not have been admitted before the Grand Jury and at his trial because the police had used a sham warrant to arrest him for the purpose of interrogation regarding another crime. (First A.D. Brief, Pt. II B-2, 28; Pt. VII-3 68). These arguments on appeal were based solely on New York case law concerning the administration of the state courts (see, People v. Weinstein, 11 N.Y.2d 1098; 230 N.Y.S.2d 721 (1962); People v. Robinson, 13 N.Y.2d 296, 246 N.Y.S.2d 263 (1963)); they were not explicitly based on the Fourth Amendment. Coupled with the fact that the record

before the Appellate Division did not contain evidence on whether there was probable cause to make a warrantless arrest, it cannot be said that the Appellate Division gave "full consideration" to petitioner's Fourth Amendment claim when the appellate arguments were summarily rejected. (People v. LaBelle, 24 App. Div. 2d 350, 351, 266 N.Y.S.2d 165, 166 (3d Dept. 1971)).

Before the Court of Appeals, petitioner explicitly raised his Fourth Amendment claim (Ct. of Appeals Brief Pt. VII B-3, 63) while also renewing his argument based on New York case law (Ct. of Appeals Brief Pt. VII B-2, 59). The Court of Appeals did not give the claim full consideration, if it gave it any at all, since it was reversed on other grounds (People v. LaBelle, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966)). Consequently, the "opportunity required" was not provided on petitioner's appeals from his first trial.

E. Second Trial, 1969

At the outset of his second trial, petitioner moved for a "pre-new trial and determinative hearing as to the voluntariness and/or admissibility of any statements" (second trial 74). The motion was opposed by the People in part because "All of the arguments raised in the affidavit of defendant have been reviewed in the County Court, in the Appellate Division and in the Court of Appeals and have all

been resolved against the contentions of the defendant." (second trial 87). The Court denied the motion (second trial 90) largely for the reasons set forth in the People's argument (second trial 88-90). Consequently, petitioner's opportunity to fully litigate his Fourth Amendment claim was foreclosed at the outset of his second trial based on the pre-trial hearing in 1964 which did not satisfy the "opportunity" requirement (Point B supra.).

At the second trial, petitioner conducted a voir dire of Captain Bardossi before petitioner's statements were admitted into evidence (second trial 453-461) but only objected to their admission on voluntariness grounds (second trial 461). However, he did argue on a motion for a directed verdict of acquittal (second trial 499) that the statements should not have been admitted since they were the "poisoned fruit of a constitutional impressible and illegal seizure of his person" (second trial 50). The Court summarily rejected the motion without a statement of reasons.

These rulings cannot be said to have satisfied the "opportunity" requirement for the reasons stated in Point C, supra. The Court's total reliance on the 1964 pre-trial hearing and the failure to develop any evidence on the question of probable cause to arrest would require a new evidentiary hearing under

Townsend as set forth in Point C supra.; consequently, the opportunity required was not given (O'Berry, Gates, Point C).

At the close of the second trial, the judge charged the jury:

"The law of this State requires that a defendant arrested for a crime must be taken before a magistrate without unnecessary delay . . . I charge you that the delay in the arraignment that appeared here was unnecessary as a matter of law. I also charge you as a matter of law that this defendant was arrested on a warrant issued without compliance under the law and that the detention under the arrest was illegal. However, the fact that a statement or statements are made was made during this illegal detention or unlawful delay do not in and of themselves make the statement involuntary but are merely factors you may consider in determining its involuntariness or its voluntariness and you may consider this factor in connection with all other factors. (second trial, 757).

This charge also does not meet the opportunity requirement. First, it is not clear that the Court found that the arrest was illegal in charging that the warrant was defective since the existence of probable cause may have justified a warrantless arrest (U.S. ex rel. Edward LaBelle v. LaVallee, 517 F.2d 750, 753, 754 (2d Cir. 1975) cert. den. 423 U.S. 1062 (1976)). This point is emphasized by the Appellate Division's reference to the arrest on appeal as the "alleged illegal arrest." (People v. LaBelle, 37 App. Div. 2d 658, 660 (3d Dept. 1971)). Second, it is not clear that the Court charged

the detention was illegal due to the delay in arraignment or the defective warrant. (See, People v. Weinstein, 11 N.Y.2d 1098, 230 N.Y.S.2d 721 (1962); People v. Stanley, 15 N.Y.2d 30, 255 N.Y.S.2d 74 (1964). Finally, without evidence on the issue of probable cause, Townsend would require a new hearing since "evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing" (Townsend, 372 U.S. supra. at 759).

Consequently, without an explicit finding that the arrest was without probable cause and without evidence on the question of probable cause, the "opportunity for a full and fair litigation of (the) Fourth Amendment claim" was not provided at the second trial under either O'Berry or Gates.

F. Appeal from Second Trial

On his appeal from the second trial, petitioner explicitly raised his Fourth Amendment claim (Second App. Div. Brief Pt. VII, 26). The People in their response argued, in part, that the question had been decided on previous appeals and was academic, i.e., the law of the case had been established (Respondent's Second App. Div. Brief, Pt. VII, 19). The Court ruled:

"There is no merit to appellant's contentions that pre-arraignment oral and written statements were inadmissible, without reference to voluntariness since they followed an alleged illegal arrest. . . . Furthermore, these contentions were raised and rejected by this court when appellant's first conviction was before us on review." (People v. LaBelle, 37 A.D.2d 658,

660, 322 N.Y.S.2d 960, 964 (3d Dept. 1971).

This review and decision does not meet the "opportunity" requirement. First, it may be that the appellate court was applying the law of the case principal, i.e., the issue was decided on the prior appeals and was now academic. If this is true, then the reliance on the first appeals, which did not meet the "opportunity" requirement, cannot support an argument that this appeal meets the requirement. (See Pt. D, supra.)

Second, the Court's decision does not clearly indicate whether the decision is on the failure to promptly arraign or on the Fourth Amendment question.

Finally, the Court's reference to an alleged illegal arrest pinpoints the inadequacy of this proceeding to meet the opportunity requirement. Since petitioner did not have the opportunity to develop a clear record on the probable cause issue, petitioner could not possibly have had a "full and fair opportunity" to present the claim on direct review. This is precisely the reason why O'Berry indicates that appellate review alone cannot meet the opportunity requirement where something would "be served by ordering a new evidentiary hearing" (O'Berry, 546 F.2d supra. at 1211) and this is also the reason for requiring new evidentiary hearing on habeas petitioners where Townsend type situations exist.

In total, the "opportunity" requirement was never granted to petitioner and the District Court's dismissal on Stone was in error.

POINT II: THE PETITION SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF THE MERITS OF PETITIONER'S FOURTH AMENDMENT CLAIM WITH THE DIRECTION THAT AN EVIDENTIARY HEARING BE HELD ON WHETHER THERE WAS PROBABLE CAUSE FOR PETITIONER'S ARREST WITHOUT A WARRANT.

The merits of petitioner's Fourth Amendment claim were not reached by the District Court. It is petitioner's position that this matter should be remanded to the District Court to consider the merits of the claim and to hold an evidentiary hearing on the issue of probable cause for a warrantless arrest as required by Townsend v. Sain, 372 U.S. 314 (1963) (see, Point I supra). Consequently, petitioner will merely summarize his argument on the merits here. His brief in support of the petition contained in the Appendix (A. 5-19) expounds on these points.

Wong Sun v. U.S., 371 U.S. 471 (1963) as clarified by Brown v. Illinois, 422 U.S. 596 (1975) holds that a statement directly resulting from an illegal arrest where the taint of the arrest has not been purged must be suppressed under the Fourth Amendment even if it is voluntary under the Fifth Amendment (Brown, 422 U.S. supra. at 601; A. 10-11).

Consequently, under the Brown analysis of Wong Sun, the petitioner's statements should have been suppressed and the habeas corpus petition granted, if:

- A. The arrest was illegal.
- B. Petitioner's statements were the result of the arrest.
- C. The State failed to show the taint of the illegal arrest was removed from the statements.
- D. It was not harmless error to admit the statements.

A. The record shows that the arrest warrant was defective under New York law (A. 12). In 1963, New York law did not allow warrantless arrests for misdemeanors (A. 12-13). However, this Court in U.S. ex rel. Edward LaBelle v. LaVallee, 517 F.2d 750 (2d Cir. 1975) cert. den. 423 U.S. 1062 (1976), concerning petitioner's brother and co-defendant, held a warrantless arrest is permissible if there was probable cause for a felony arrest "although the police officer did not accurately name the offense for which the arrest was made" (517 F.2d supra. at 754 citing U.S. v. Bonds, 422 F.2d 660, 664 (8th Cir. 1970). Petitioner concedes that his alleged acts with regard to Mary Donlan could have constituted a felony (517 F.2d supra. at 754 n. 6, 7) thereby allowing a warrantless arrest if probable cause existed to arrest him. However, this Court's conclusion that there was probable cause to arrest Edward LaBelle "based upon the collective knowledge of the police rather than the

arresting officer" (517 F.2d 753-754) does not lead to the same conclusion with regard to petitioner.

The record clearly shows that the arresting officers did not have probable cause to arrest petitioner (A. 13). The record also does not support a finding that the State satisfied its burden of showing that probable cause existed for petitioner's arrest based on the police's collective knowledge.

The affidavit of Mary Donlan (first trial exhibits, exhibit 6, p. 59) while clearly identifying Edward by his license plate number (517 F.2d supra. at 754) does not identify petitioner. The description of petitioner in the affidavit as blond-headed is inaccurate since Detective Barry testified that petitioner's hair was dark on the day of the arrest (first trial 432-433). Richard Smith, even if he had spoken to the police before the arrest (see, 517 F.2d supra. 754 n. 4), only knew and identified Edward before the arrest (first trial 706, 727). Although the record contains testimony of several persons that petitioner and his brother were together on the day of the assault (second trial 184, 202, 216, 222, 237), it does not show whether the police obtained this knowledge before the arrest. In total, the record does not answer the probable cause question. Consequently, a new evidentiary hearing is required on this issue since "(1) the merits of the factual

dispute were not resolved in the state court hearing" and "(5) the material facts were not adequately developed at the state court hearing." (Townsend, 372 U.S. supra. 313, Point I supra.)

B. The record and case law support the conclusion that petitioner's statements were the direct result of his illegal arrest (A 14-16).

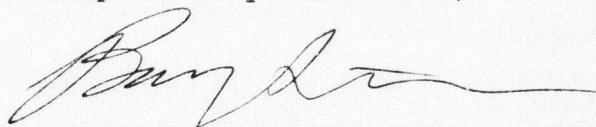
C. The state failed to show that the taint was dissipated under applicable case law (A. 16-18).

D. The admission of petitioner's statements was harmful error and the cornerstone of the evidence against him (A. 18-19).

CONCLUSIONS

For the foregoing reasons the decision of the District Court should be reversed and remanded to the District Court with the direction that it consider the merits of petitioner's Fourth Amendment claim and hold an evidentiary hearing on the issue of probable cause for a warrantless arrest of petitioner.

Respectfully submitted,



Cornell Legal Assistance Project
for the Auburn Correctional
Facility

Barry Strom, Esq. (of counsel)
Myron Taylor Hall
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APPENDIX

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Decision and Order of District Court	A-2
Appellant's Brief before the District Court	A-5

DOCKET ENTRIES

76-CV-182

DATE	NR.	PROCEEDINGS
1976		
Apr. 27	1	Filed Application for Writ of Habeas Corpus, Application for Leave to Proceed in Forma Pauperis and Affidavit of Richard LaBelle
Apr. 27	2	Filed Brief of Petitioner in Support of Application for Writ of Habeas Corpus
Apr. 27	3	Filed State Court Brief of Appellant
Apr. 27		Entire file mailed to Judge Port pursuant to the order of rotation and assignment
1977		
Mar. 17	4	Filed Memorandum-Decision and Order of Judge Port(3/8/77)denying and dismissing the petition for writ of habeas corpus and leave to proceed in forma pauperis is granted and the Clerk is directed to file the papers without payment of the prescribed fees
Mar. 17	5	Filed Judgment and mailed cards, re: Judgment to Cornell Legal Assistance Project for the Auburn Correctional Facility
Apr. 11	6	Filed Notice of Appeal, Application for Certificate of Probable Cause & endorsement of Judge Port granting application
May 2		Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
May 23	7	Filed receipt for papers sent to C.C.A.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
RICHARD LaBELLE,

Petitioner,

v.

76-CV-182

THE HONORABLE ROBERT J. HENDERSON,
Superintendent of Auburn Correctional
Facility,

Respondent.

EDMUND PORT, Judge

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration the above captioned petition for a writ of federal habeas corpus together with an affidavit in forma pauperis from the named state inmate who is presently confined in the Auburn Correctional Facility, Auburn, New York. The petition and the 28 U.S.C. §1915 application were prepared for the petitioner by the Cornell Legal Assistance Project for the Auburn Correctional Facility, Myron Taylor Hall, Ithaca, New York 14853.¹ In addition, the Cornell Project paid the initial \$5.00 filing fee to the Clerk on behalf of the inmate.

The petitioner was convicted following a jury verdict for Murder 1st degree and sentenced to life imprisonment on December 10, 1969, following a retrial in the Renasalaer County Court.² On direct appeal, the Appellate Division affirmed³ and the Court of Appeals is

¹ John J. Capowski, Esq., and Barry Strom, Esq., being the attorneys for the Cornell Project.

² Petitioner's original conviction in 1964 was reversed by the New York State Court of Appeals. People v. Richard M. LaBelle, 18 N.Y.2d 405 (1966).

³ People v. Richard M. LaBelle, 37 A.D.2d 628 (3rd Dept. 1971).

alleged to have denied leave to appeal in 1971. This court is familiar with the crime, and its circumstances, for which the petitioner stands convicted, as I have previously denied a petition for a writ of habeas corpus brought by the petitioner's brother and codefendant during his first trial--Edward F. LaBelle. United States ex rel. Edward F. LaBelle v. LaVallee, 73-CV-518 (N.D.N.Y. Nov. 16, 1973) aff'd 517 F.2d 750 (2d Cir. 1975) cert. denied 423 U.S. 1062 (1976).

The Cornell Project has supplied the court with the following state court records in connection with the petitioner's case: transcript of the retrial, volume 1 of the original trial, and the briefs on appeal from the conviction on the retrial. The Rensselaer County Clerk (John J. Wright, Deputy County Clerk) has supplied the court with the following records: minutes of the retrial, record on appeal including an exhibit volume, and the minutes of a 1964 suppression hearing. I express my appreciation and thanks to the Cornell Project and the Rensselaer County Clerk for their assistance in supplying the state court records; all records are being returned directly to the party supplying the same.

The petitioner contends that his conviction is constitutionally infirm since it was allegedly based "upon a confession obtained as a result of an illegal arrest in violation of his Fourth and Fourteenth Amendment rights." It is claimed that the "taint" of the illegal arrest permeated the statements and was not dissipated.

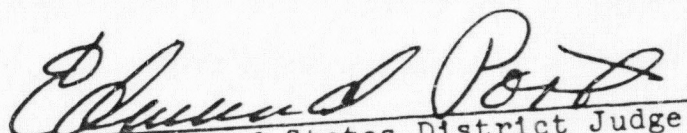
The petitioner's contention is foreclosed by Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976), in which the Court held:

that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. Id. at 5321.

The petitioner herein has had not only the "opportunity" for, but the actuality of a full and fair litigation of his Fourth Amendment claim. Cf. Gates v. Henderson, docket no. 76-2065 (2d Cir. Jan. 12, 1977). Accordingly, the petition herein must be denied and dismissed. In fairness to the Cornell Project, it must be pointed out that the petition herein was filed prior to the handing down of Stone v. Powell, supra, by the Supreme Court.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted, and the Clerk is directed to file the papers herein without the payment of the prescribed fees.


Senior United States District Judge

Dated: March 8, 1977
Auburn, New York.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.	)
RICHARD M. LABELLE,	)
	)
Petitioner,	)
	)
v.	)
	)
THE HONORABLE ROBERT J. HENDERSON,	)
Superintendent of Auburn Correctional	)
Facility,	)
	)
Respondent.	)

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF
HABEAS CORPUS

PRELIMINARY STATEMENT

Petitioner, Richard M. LaBelle, an inmate at the Auburn Correctional Facility, seeks the issuance of a writ of habeas corpus because his 1969 N.Y. State conviction for felony murder resulted from the use at trial of his inculpatory statements. These statements should have been excluded under the Fourth and Fourteenth Amendments as construed by the U.S. Supreme Court in Wong Sun v. United States, 371 U.S. 471 (1963) and Brown v. Illinois, 422 U.S. 590 (1975), since they were the direct result of an illegal arrest made in violation of his Constitutional rights. Consequently, petitioner's detainment and imprisonment as a result of said conviction are unlawful and improper and the writ of habeas corpus should issue.

ISSUES PRESENTED

1. Whether petitioner's oral and written statements admitted at his trial should have been suppressed since:
 - a. Petitioner's arrest was illegal,
 - b. Petitioner's statements were a direct result of his illegal arrest, and
 - c. The prosecution failed to show the taint of the illegal arrest had been dissipated from the statements.
2. Whether petitioner's conviction and subsequent imprisonment is unlawful and unconstitutional as his conviction was based upon the harmful admission of his statements.

STATEMENT OF FACTS

The arrest

On December 3, 1963, at 10:00 a.m. petitioner was arrested on a "John Doe" warrant alleging third degree assault on a Mary Dolan. (R. 271)* The warrant was issued by Joseph Daly, the Police Justice of the City of Troy, (R. 371). It was obtained in the following manner:

On December 2, 1963, Lieutenant Brandon of the State Police contacted Leo Barry, a Rennsaelaer County detective, and asked him to obtain an arrest warrant on a misdemeanor

*All references are to the record of appeal before the Appellate Division, Third Department. Petitioner has only one copy of said record which will be presented upon request.

charge of third degree assault on a Mary Dolan (R. 313). Earlier that day Miss Dolan, at the local State Police Headquarters, had signed an affidavit alleging that the passenger of a certain car had tried to grab her on November 28, and she had memorized the license plate number (R. 430). However, this affidavit was not presented to Judge Daly (R. 501). Rather, the warrant was issued solely on information and belief, that the assault on Mary Dolan had occurred (R. 507). It is not clear from the record that Detective Barry had even seen the Dolan affidavit at that time.

The warrant was served by two state police officers, Bardossi and Garrett, who testified at trial that they had no personal knowledge of the alleged assault and the record does not show that the arresting officers had any other information about the assault. (R. 457).

Interrogation

On the way to police headquarters the arresting officers immediately began questioning petitioner about the murder of Rosemary Snay (R. 278). Once petitioner was taken into headquarters, a thirteen hour period of incommunicado custodial interrogation began. During this period of detention petitioner was questioned solely about the Snay murder and never about the alleged third degree assault of Mary Dolan. Petitioner was

questioned by Captain Bardossi, subjected to a lie detector test, and finally questioned by Lieutenant Brandon. At approximately 11:00 p.m. petitioner made an oral statement to Lt. Brandon, which was transcribed and signed by petitioner at approximately 3:30 a.m. (R. 302, 451). Petitioner was never arraigned on the third degree assault charge (R. 103).

Statement

Petitioner's statement indicated that he and his brother had been with Rosemary Snay on the night she was murdered, that he had been in the car when his brother raped Rosemary Snay and that he was in the car while his brother struck and killed her. The statement also indicated that at various points in the evening petitioner attempted to intercede on Ms. Snay's behalf but that he never presented any physical resistance to his brother's actions because he was afraid his brother would harm him also. (See Record--People's Exhibit 57).

Admission of the Statement

At petitioner's second trial (see court proceedings below) the court allowed petitioner's statement to be introduced into evidence.

The court clearly concluded at the trial that petitioner's arrest was illegal. However, the court, also, concluded that the illegal arrest was only a factor to be considered in determining the voluntariness of petitioner's statement. The trial court's view of the illegal arrest is shown in its charge to the jury:

I also charge you as a matter of law that the defendant was arrested on a warrant issued without compliance under the law and that the detention under the arrest was illegal. However, the fact that a statement or statements was made during this illegal detention or unlawful delay do not in and of themselves make the statement involuntary but are merely factors you may consider in determining its involuntariness or its voluntariness and you may consider this factor in connection with all other factors . . . (Emphasis added) (R. 757)

The trial court's admission of petitioner's statement was made notwithstanding the objection that statements should be suppressed because they were "demonstrably the poisoned fruit of a constitutionally impermissible and illegal seizure of his person in violation of his rights." (R. 500)

The admission of the statements was affirmed on appeal to the Appellate Division, Third Department (People v. LaBelle, 37 A.D.2d 658 (3d Dept. 1971) with the conclusionary statement that petitioner's objection had "no merit."

Court Proceedings

On November 27, 1964, petitioner was originally convicted of first degree murder in Rennsaelaer County, in a joint trial with his brother, Edward. The Appellate Division, Third Department in People v. LaBelle, 24 App. Div. 350 (3d Dept. 1966) affirmed the conviction, however, the Court of Appeals, 18 N.Y.2d 405 (1966) reversed the convictions on several grounds and ordered a second trial. At the retrial in 1969 petitioner was convicted of a felony murder and this conviction was affirmed in People v. LaBelle, 37 A.D.2d 658 (3rd Dept. 1971); leave to appeal was denied by the Court of Appeals in 1971.

Exhaustion of State Court Remedies

The grounds upon which this writ is based were raised before the Third Department of the Appellate Division of the Supreme Court of New York which affirmed the convictions and thereafter before the Court of Appeals which denied leave to appeal. Therefore, petitioner is prevented from challenging his conviction on these grounds by means of the New York post-conviction proceeding, section 440.10 of the Criminal Procedure Law. Consequently, all his state court remedies by both appeal and post-conviction collateral attack have been exhausted.

ARGUMENT

THE ADMISSION OF PETITIONER'S STATEMENTS VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT NOTWITHSTANDING THE FACT THAT THEY MAY HAVE BEEN VOLUNTARY.

The Supreme Court of the United States in Wong Sun v. U.S., 371 U.S. 471 (1963) has held that statements which are obtained as the result of an illegal arrest must be excluded as the "fruit of the poisonous tree", unless the State can show that the taint of the illegal arrest has been dissipated.

In Brown v. Illinois, 422 U.S. 596, (1975) the Supreme Court explicitly indicated that statements obtained as a result of an illegal arrest were inadmissible on Fourth Amendment grounds, even if they were found to be voluntary under the Fifth Amendment. A finding of voluntariness, alone, does not eliminate the necessity of excluding illegally obtained confessions as mandated in Wong Sun. The Supreme Court in Brown stated:

"Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto to be broken. Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." 371 U.S. at 486 . . . The voluntariness of the statement is a threshold requirement. Cf. 18 U.S.C. §3501. And the burden of showing admissibility rests, of course, on the prosecution . . . We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under Wong Sun." (422 U.S. at 601)

Brown, supra, implicitly overruled the New York view of Wong Sun stated in People v. Briggs, 36 A.D.2d, 319 N.Y.S.2d 374 (3rd Dept., 1971). There the court said:

"The fact that admissions or confessions are obtained from a defendant during a period of illegal detention following an unlawful arrest does not, as a matter of law, render them inadmissible, the manner of the arrest and the subsequent detention being merely circumstances to be considered on the issue of voluntariness (People v. Everett, 10 N.Y.2d 500, 507).

Consequently under the Brown analysis of Wong Sun the petitioner's statements should have been suppressed as the record shows:

- A. Petitioner's arrest was illegal.
- B. Petitioner's statements were the result of the illegal arrest.
- C. That State failed to show the taint of the illegal arrest was removed from the statements.

A. Petitioner's Arrest was Illegal.

At trial, the judge found petitioner's arrest unlawful under New York law because the warrant was defective. The issuance of the arrest warrant at that time was governed by sections 148-151 of the New York Code of Criminal Procedure. According to these sections an arrest warrant had to be based upon an information laid before a magistrate who had to then examine the informant or prosecutor under oath. An information based wholly on information and belief was an insufficient basis for issuing an arrest warrant, if the underlying sources and grounds were not included. People v. Smith, 266 App. Div. 57 (1943). People v. Jefferies, 19 N.Y. 564 (1967). Therefore, the arrest warrant as it was actually issued was totally defective under New York law.

Moreover, Section 177 of the Code of Criminal Procedure mandated that police officers could not make arrests for misdemeanors which had not occurred in their presence, without obtaining a warrant, People v. Dreares, 15 A.D.2d 204 (1961) aff'd, 11 N.Y.2d 906 (1962). Consequently, even if independent probable cause for petitioner's arrest existed on the misdemeanor assault charge, the arrest would still have been illegal as the trial court concluded.

Going beyond the relevant state statutory provisions, there was no probable cause for the arrest without a warrant. A warrantless arrest can only be held lawful if the arresting officers had sufficient probable cause to arrest. The burden

of proof on this issue is upon the State (see, U.S. v. Elgisser, 334 F.2d 103 (1964), cert. denied, 379 U.S. 879 (1964)) and information never put into evidence may not be used to support a finding that probable cause existed (U.S. v. Harris, 435 F.2d 74 cert. denied, 402 U.S. 986).

In the present case the trial record clearly indicates the arresting officers did not have probable cause. In fact, the arresting officers testified that neither of them even knew the name of the complaining witness, upon whose allegations the warrant was issued. (R. 457)

Although knowledge of one police officer may be imputed to an arresting officer, the officer initiating the chain of communication must have probable cause and this information must be funnelled to the arresting officer (Brown v. State, 443 S.W.2d 261 and U.S. v. Pentado, 463 F.2d 335, 1972 cert. denied, 1972, 409 U.S. 1079; Whiteley v. Warden, 401 U.S. 560 (1971)).

Therefore, even if Lt. Brandon, the officer who spoke with Mary Dolan, had probable cause the arrest still would have been unlawful, since the trial record does not disclose any basis for finding that sufficient information was communicated to the arresting officers to give them probable cause.

Consequently, even if applicable New York law had authorized warrantless arrests for misdemeanors not committed in an officer's presence, the arrest would still have been unlawful.

B. Petitioner's Statements resulted from the Illegal Arrest.

In Commonwealth of Pa. ex rel Craig v. Maroney, 348 F.2d 22 (3rd Cir., 1965) the court singled out two factors of major significance for determining whether the causal relationship between an illegal arrest and subsequent confession had been broken:

- (a). Proximity of an initial illegal custodial act to the procurement of the confession; and
- (b). the intervention of other circumstances subsequent to an illegal arrest which provide a cause so unrelated to the initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest. 348 F.2d at 29.

In petitioner's case it is clear that the second factor in Craig mandates a finding that the confession resulted from the arrest. There were no intervening circumstances between the illegal arrest and subsequent confession that would break the causal link. On the contrary, the thirteen hours of continued questioning of petitioner, while in custody, unaided by an attorney, tightened the causal link.

In Collins v. Beto, 348 F.2d 823, 828 (5th Cir., 1965) the court examined the first factor set out in Craig, supra, the proximity of the arrest to the confession. There the court found that the prosecution failed to show by clear and convincing evidence that the causal link was broken even though considerable time elapsed between the arrest and statement. The court reached this conclusion due to the pretext nature of the arrest saying:

-11-

It is clear that the confession obtained on the morning of January 21st was the "target" of Collins' unlawful detention. Collins was kept in custody, not because the police had a legitimate basis for detaining him as long as they did, but merely because his detention and questioning were aids in their "investigation." Nor can the mere passage of time serve to "dissipate the taint" of an unlawful arrest. If this were so, the police would be free simply to keep a suspect "on ice" for a day or two before beginning interrogation. This would postpone the tasting of the fruit but would not diminish its temptation." (emphasis added).

The circumstances emphasized in Collins, are quite similar to those in petitioner's case. Petitioner, too, was arrested on a "John Doe" warrant which proved to be merely a means for interrogating him about an unrelated crime. Petitioner also was held incommunicado for a lengthy period of time during which he was subjected to a lie-detector test and intense questioning. Petitioner's rights were also not safeguarded by the presence of an attorney.

Moreover, it is evident from the record that petitioner was arrested for the sole purpose of questioning him about the Snay murder. In fact, he was never questioned about nor arraigned on the Dolan assault charge. (R. 273, 457, 461)

In Gockley v. Myers, 450 F.2d 232, 2361 (3d Cir. 1971), the court in dealing with strikingly similar circumstances stated:

"The arrest of Gockley . . . was much more than a causa sine qua non of his statement . . . the record compels the conclusion that the very purpose of the arrest . . . was to obtain and maintain control over him as would facilitate persistent and effective interrogation This deliberate misuse of arrest is underscored by the fact that Gockley was never granted an arraignment or a bail hearing on the forgery [arrest] charge . . ." [emphasis added].

A total examination of the record and the relevant factors compels the unmistakable conclusion that interrogating of petitioner was the goal of his illegal arrest. The objective was achieved when petitioner made his statements. Under such circumstances time alone was not enough to break the causal link between the arrest and the confession. Since no other factor exists to break the link, the conclusion must be that petitioner's statements directly resulted from his illegal arrest.

C. The State Failed to Show that the Taint was Dissipated.

There is nothing in the record to support a contention that the taint of the illegal arrest had been dissipated when petitioner's statement was elicited. Wong Sun, 371 U.S. 471 (1963) requires the State to show either an attenuated connection between an illegal arrest and subsequent statement or that the confession is purged of the primary taint (371 U.S. supra at 488 and 491).

In Collins v. Beto, 348 F.2d 823 (5th Cir. 1965) the court stressed the burden which rests on the prosecution:

"Even when, as here, there is a connection between the confession and the unlawful arrest, the confession may still be admissible if the state establishes that its officers had "purged the taint" prior to the time the inculpatory statement was given. The best and perhaps the only way to accomplish this would be to afford the suspect an effective opportunity to obtain assistance of counsel." (Emphasis added)

In Collins, supra, the court added that the right to be furnished counsel did not depend on a request. 348 F.2d at 830.

Recently the Supreme Court in Brown v. Illinois, 422 U.S. 590, 603 (1975) reemphasized that the burden rests on the prosecution to show that the taint has been dissipated and ruled that Miranda warnings alone, could not be found to have dissipated the taint.

Not only does the record in petitioner's case fail to show that the primary taint was dissipated; the testimony reveals just the sort of connection the Supreme Court was concerned with in Wong Sun. In this case the State failed to meet its burden of proof in establishing the dissipation and the evidence illustrates the conscious aim of the police to arrest petitioner in order to question him about another, more serious crime.

Not only was an attorney not present during petitioner's 13 hours of questioning; he was held totally incommunicado during the period and was subjected to intensive questioning and a lie detector test; all of which was part of an entire scheme to obtain a confession from petitioner during his illegal detention.

In total, the events which transpired between petitioner's arrest and confession exacerbated the taint rather than attenuate it. Certainly, the record does not even suggest that the state satisfied its burden to show the taint was dissipated.

II. The Admission of Petitioner's Statements was a Harmful Error.

The standard for determining whether a federal constitutional error is harmless was explained in Chapman v. State of California, 386 U.S. 1823 (1967):

"Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"

In petitioner's case the constitutional error was of grave significance. Admission of his illegally obtained confession was the only evidence which placed him at the scene of the crime. There is no other direct or circumstantial evidence that Richard M. LaBelle conspired or was even aware of his brother's criminal intent to rape and murder Rosemary Snay.

In Fahy v. State of Connecticut, 375 U.S. 85, 86 the Supreme Court reemphasized that standard applied to harmless errors:

"The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In petitioner, Richard M. LaBelle's case examination of the record shows there is more than a reasonable possibility that the improperly admitted admissions contributed to his conviction. These statements were the only basis upon which he was convicted.

For the foregoing reasons the admission of these statements constituted harmful error and petitioner's conviction must be overturned.

CONCLUSION

Since the petitioner's statements on which his conviction was based were the "fruit" of an illegal arrest within the meaning of Wong Sun, this petition for a writ of habeas corpus should be granted.

Respectfully submitted,

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Assisted by:
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD LaBELLE,

Appellant,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Appellee.

No. 77-2052

STATE OF NEW YORK)

: ss.

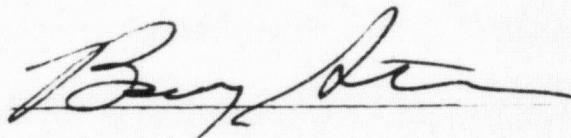
COUNTY OF TOMPKINS)

Barry Strom being duly sworn, deposes and says:

1. Deponent is not a party to this appeal, is over 18 years of age and resides at Apt. 2, 309 Eddy Street, Ithaca, New York 14850.

2. On the 6th day of June, 1977, deponent served one copy of the brief, appendix and extracts from state court proceedings upon Louis J. Lefkowitz, Attorney General of the State of New York, attorney for appellee, Henderson, by sending said documents to Jack Hoffman, Esq., Assistant Attorney General, Department of Law, The Capitol, Albany, New York 12224, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly

addressed wrapper at a post office under the exclusive care
and custody of the United States Postal Service within the
State of New York.

A handwritten signature in dark ink, appearing to read "Barry Ström", written over a horizontal line.

Barry Ström

Sworn to before me this ____
day of June, 1977.

Notary Public